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Nos. 08-626 and 08-759

In the Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC, PETITIONER

v.

CITY OF ST. LOUIS, MISSOURI

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

SAN DIEGO COUNTY, CALIFORNIA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," preempts only those state and local requirements that have an actual effect on the ability to provide service, as opposed to those that might have such an effect in the future.

2. Whether 47 U.S.C. 253(c), which provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation * * * for use of public rights-of-way," preempts regulations not otherwise preempted by 47 U.S.C. 253(a).

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In the Supreme Court of the United States

No. 08-626

LEVEL 3 COMMUNICATIONS, LLC, PETITIONER

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CITY OF ST. LOUIS, MISSOURI

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases. In the view of the United States, both of the petitions for writs of certiorari should be denied.

STATEMENT

1. Before 1996, "States typically granted an exclusive franchise in each local service area to a local exchange carrier" to provide local telephone service.

AT&T v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress eliminated those monopoly franchises by enacting 47 U.S.C. 253, which "prohibits state and local regulation that impedes the provision of 'telecommunications service.'" *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 491 (2002) (citation omitted). Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). Section 253(c) creates a safe harbor from that basic prohibition by providing that Section 253 does not "affect[] the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way." 47 U.S.C. 253(c).

Under 47 U.S.C. 253(d), the Federal Communications Commission (FCC or Commission) is authorized to "preempt the enforcement of" any state or local "statute, regulation, or legal requirement" that it determines violates Section 253(a). The Commission has concluded that a law "prohibits" an entity from providing telecommunications service if it imposes "an express legal prohibition of service covering all of the relevant geographic market." *California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Sec. 253(d) of the Commc'ns Act of 1934*, 12 F.C.C.R. 14,191, 14,205 ¶ 30 (1997) (*California Payphone Order*). The Commission has concluded that a law "has the 'effect of prohibiting' the ability of any entity to provide" telecommunications

service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14,206 ¶ 31.

2. *No. 08-626.* a. This case concerns a St. Louis ordinance that requires telecommunications providers using public rights-of-way to obtain licenses from the city and to comply with various municipal requirements. 08-626 Pet. App. 24a-25a. The city also imposes an annual license fee, which is calculated on the basis of the "number of linear feet of conduit installed" and the "number of active conduits within each linear-foot." *Id.* at 25a.

In April 1999, petitioner Level 3 Communications (Level 3) entered into a license agreement with St. Louis. 08-626 Pet. App. 24a. After disputes arose regarding the validity of the license fee and various non-fee requirements, each party brought suit against the other in the United States District Court for the Eastern District of Missouri. *Id.* at 25a. On cross-motions for summary judgment, the district court concluded that the ordinance "includes several provisions that in combination have the effect of prohibiting the ability to provide telecommunications services under 47 U.S.C. § 253(a)." *Id.* at 49a (quotation marks omitted). The court held that the city's license fee was not saved by the Section 253(c) safe harbor because the city had not shown that the fees "have any relation to the City's costs in managing, inspecting, and maintaining its rights-of-way," and so had failed to meet its burden of proving that the fees were "fair and reasonable." *Id.* at 54a. The court upheld the ordinance's non-fee provisions, however, as reasonable management requirements for rights-of-way under Section 253(c). *Id.* at 56a-70a.

b. The Eighth Circuit reversed. 08-626 Pet. App. 23a-35a. The court observed that Section 253(a) "states the general rule" of preemption, while Section 253(c) "provides the exception—a safe harbor functioning as an affirmative defense—to that rule." *Id.* at 27a-28a. The court then stated that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Id.* at 29a. Relying on the FCC's *California Payphone Order*, the court explained that, in order to prevail on a claim of preemption under Section 253(a), a plaintiff "need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." *Id.* at 31a (citation omitted).

Applying its interpretation of Section 253, the court of appeals found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." 08-626 Pet. App. 32a. In reaching that conclusion, the court emphasized Level 3's acknowledgment that it could not "state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." *Ibid.* (quotation marks omitted). The court further concluded that, because Level 3 had failed to carry its burden of showing that the city's license fee fell within Section 253(a), it was "premature" to consider whether the fee was "fair and reasonable" under Section 253(c). *Id.* at 32a-33a. The court stated that Section 253(c) does not have independent preemptive effect, but instead is a safe harbor for legal requirements that would otherwise violate Section 253(a). *Id.* at 28a-29a.

c. On remand, the district court denied Level 3's request to reopen discovery, and it upheld the city's ordinance and its license agreement in their entirety. 08-626 Pet. App. 10a-22a. The Eighth Circuit affirmed. *Id.* at 1a-9a.

3. *No. 08-759.* a. This case involves a San Diego County ordinance that "imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities," such as cell towers. 08-759 Pet. App. 2a. The ordinance prescribes application requirements for parties seeking to construct wireless facilities (*id.* at 100a-102a); creates a four-tier application-processing system based "primarily on the visibility and location of the proposed facility" (*id.* at 3a; see *id.* at 102a-107a); designates certain zones and locations as "preferred" for the siting of wireless facilities (*id.* at 107a-110a); and establishes various design and maintenance standards for such facilities (*id.* at 110a-113a). The county "retains discretionary authority to deny a use permit application or to grant the application conditionally." *Id.* at 4a.

Petitioner Sprint Telephony PCS, L.P. (Sprint) sued San Diego County in the United States District Court for the Southern District of California, alleging that the ordinance was preempted under Section 253. 08-759 Pet. App. 4a-5a. The district court granted in part and denied in part Sprint's motion for partial summary judgment. *Id.* at 54a-55a. The court concluded (*id.* at 61a-64a) that Sprint could invoke Section 253 as a possible basis for preemption notwithstanding 47 U.S.C. 332(c)(7), which addresses the application of state and local zoning laws and "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of

[wireless] facilities." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005).

Turning to the merits of the Section 253 claim, the district court concluded that San Diego's wireless-siting ordinance, viewed together with the county's non-telecommunications-specific "use permit" regulations, had "the collective effect of prohibiting the provision of telecommunications service." 08-759 Pet. App. 70a. The district court stated that, under the county's regulatory framework, applicants must comply with "burdensome submission requirements," must "state their willingness" to allow other carriers to co-locate their facilities with those of the applicant, and are subject to unrestricted public hearings and the county's "unfettered discretion" as to whether a permit will be granted or modified and the conditions that will be imposed. *Id.* at 70a-71a.

b. A panel of the Ninth Circuit affirmed, 08-759 Pet. App. 18a-53a, but the Ninth Circuit then granted rehearing en banc and unanimously reversed the district court's judgment, *id.* at 1a-17a. The en banc court first considered the relationship between Sections 253 and 332(c)(7). *Id.* at 6a-13a. The court observed that Section 332(c)(7)(B)(i)(II) preempts local regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II). The court explained that, under circuit precedent, "a locality runs afoul of that provision if (1) it imposes a 'city-wide general ban on wireless services' or (2) it actually imposes restrictions that amount to an effective prohibition." 08-759 Pet. App. 8a (quoting *MetroPCS, Inc.* v. *City & County of San Francisco*, 400 F.3d 715, 730 (9th Cir. 2005)). In contrast, the court noted that, beginning with *City of Auburn* v. *Qwest*

Corp., 260 F.3d 1160 (2001) (*Auburn*), cert. denied, 534 U.S. 1079 (2002), the Ninth Circuit had interpreted Section 253(a)'s "nearly identical text" to reach local regulations that "'may . . . have the effect of prohibiting'" the provision of telecommunications services. 08-759 Pet. App. 8a (quoting *Auburn*, 260 F.3d at 1175); see *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005). Under the *Auburn* standard, a local regulation would be preempted if it "'allow[ed] a city to bar' provision of services" because, for instance, it "imposed procedural requirements, charged fees, authorized civil and criminal penalties, and * * * reserved discretion to the city to grant, deny, or revoke" permits. 08-759 Pet. App. 8a-9a (quoting *Auburn*, 260 F.3d at 1176).

The Ninth Circuit concluded that the *Auburn* standard was not consistent with the language of Section 253. 08-759 Pet. App. 10a-11a. Accordingly, the court "overrule[d] *Auburn* and join[ed] the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.'" *Id.* at 11a (quoting 08-626 Pet. App. 29a). Having thus "harmonize[d]" its "interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II)," the court concluded that it "need not decide whether Sprint's suit falls under § 253 or § 332." *Id.* at 13a.

Turning to the merits of the preemption claim, the court of appeals held that, because Sprint had raised a facial challenge to San Diego's ordinance, Sprint was required to establish that "no set of circumstances exists under which the [ordinance] would be valid." 08-759 Pet. App. 13a-14a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The court concluded that Sprint

had failed to make that showing. *Id.* at 14a-17a. The court acknowledged that the ordinance granted local officials "some discretion" with respect to wireless-siting applications, and that it imposed various application and public hearing requirements on providers. *Id.* at 15a. The court determined, however, that those provisions would not necessarily be implemented in a manner that would cause wireless services to be effectively prohibited. *Id.* at 14a-15a. The court explained that "[i]t is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of * * * the provision of wireless services and other valid public goals such as safety and aesthetics." *Id.* at 15a. The court also concluded that Sprint "ha[d] not identified a single [substantive] requirement" of the ordinance "that effectively prohibits it from providing wireless services." *Id.* at 15a-16a.

DISCUSSION

Although some aspects of the Eighth and Ninth Circuits' opinions might be read to suggest an unduly narrow understanding of Section 253(a)'s preemptive scope, neither decision warrants this Court's review. Both courts of appeals correctly held that a plaintiff seeking preemption under Section 253 cannot meet its burden simply by alleging that, under circumstances that might exist at some indeterminate future time, a legal requirement "may" affect its ability to provide a telecommunications service. Instead, a plaintiff must present evidence of the practical effects of the requirement at issue. In these cases, the courts of appeals concluded that

petitioners had failed to carry that burden. Those case-specific determinations do not warrant further review.

Nor is there a clear conflict among the circuits on the standard for preemption under Section 253(a). The courts of appeals uniformly recognize that the FCC's *California Payphone Order*, 12 F.C.C.R. 14,191 (1997), prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service. Although some circuits have interpreted the Commission's standard through the lens of *Auburn*'s more-preemptive "may" standard—contrary to the approach of the Eighth and Ninth Circuits' decisions here—the conflict is not sufficiently settled or stark to warrant this Court's resolution at this time. Moreover, the Commission can use its authority under Section 253(d) to help correct and unify the interpretation and application of Section 253, obviating the need for this Court's intervention. Review is likewise not warranted to address the shallow disagreement between the Eighth and Sixth Circuits about whether Section 253(c) operates as an independent basis for preemption.

Finally, neither of the petitions presents a good vehicle for this Court's consideration of the questions presented. Both courts of appeals relied on petitioners' failure to develop substantial evidentiary records concerning the practical impact of the regulations at issue on the provision of telecommunications service. The Court could more fully consider the questions presented in a case with a better-developed factual record. In addition, in No. 08-759, there is an unresolved threshold question whether Section 253 applies to municipal ordinances that regulate the siting of wireless facilities. That issue does not independently warrant review, and

it would be a potential barrier to this Court's resolution of the question presented in the case.

A. The Eighth And Ninth Circuits Correctly Held That Preemption Under Section 253(a) Must Be Based On The Actual Effect Of A Law, Rather Than The Mere Possibility Of A Future Effect

1. The Eighth and Ninth Circuits held "that a plaintiff suing a municipality under section 253(a) must show" that the municipal ordinance that it seeks to have preempted results in the "actual or effective prohibition" of a carrier's ability to provide telecommunications services, "rather than the mere possibility of prohibition." 08-626 Pet. App. 31a; see 08-759 Pet. App. 11a. That conclusion is consistent with the language of Section 253(a) and with the Commission's decisions applying that provision.

Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). As the Eighth Circuit observed, the "subject of the sentence * * * is followed by two discrete phrases, one barring any regulation which prohibits telecommunications services, and another barring regulations achieving effective prohibition." 08-626 Pet. App. 30a; accord *California Payphone Order*, 12 F.C.C.R. at 14,205-14,206 ¶¶ 30-31.

Focusing on the word "may" in Section 253(a), some courts of appeals have suggested that "'regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted,'" without regard to their "actual impact" on service providers.

Qwest Commc'ns, Inc. v. *City of Berkeley*, 433 F.3d 1253, 1256-1257 (9th Cir. 2006) (quoting *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), cert. denied, 544 U.S. 1049 (2005)). That suggestion is incorrect, and petitioners make little effort to defend it. As the Ninth Circuit explained below, "Congress' use of the word 'may' works in tandem with the negative modifier '[n]o' to convey the meaning that 'state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.'" 08-759 Pet. App. 10a-11a. Thus, the word "may" is properly read in this context not to refer to the possible or conceivable effects of a regulation, but rather to deny permission to States and localities to enforce the types of legal requirements that Section 253(a) forbids. Nothing in the text of Section 253(a) "results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." 08-626 Pet. App. 30a.

The Eighth and Ninth Circuits' interpretation of Section 253(a) appears to be consistent with that of the FCC. In determining whether a state or local requirement has "the effect of prohibiting the ability" of an entity to provide telecommunications services, the Commission has looked to the "practical effect" of the requirement on the entity. *Public Util. Comm'n of Tex.*, 13 F.C.C.R. 3460, 3470 ¶ 22 (1997) (*Texas PUC Order*).[1]

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[1] See *California Payphone Order*, 12 F.C.C.R. at 14,209 ¶ 38 (to violate Section 253(a), the city's contracting conduct "would have to actually prohibit or effectively prohibit the ability of a payphone service provider" to offer payphone service); *Petition of Pittencrieff Commc'ns, Inc. for Declaratory Ruling Regarding Preemption of the Tex. Pub. Util. Regulatory Act of 1995*, 13 F.C.C.R. 1735, 1752 ¶ 32 (1997) (declining to preempt where "there is no evidence on this record that these

The mere possibility that a state or local requirement might prevent a telecommunications carrier from providing service is not sufficient to violate Section 253(a).

2. Petitioners argue (08-626 Pet. 12-13; 08-759 Pet. 16) that the Eighth and Ninth Circuits interpreted Section 253(a) to require a provider to prove that it has been completely excluded from providing service in order to establish a successful preemption claim. Such an interpretation would create a serious conflict with the Commission's understanding of Section 253(a), and it would undermine the federal competition policies that the provision seeks to advance. As the Commission has explained, "Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers,"[2] and it enacted Section 253 "to ensure that its national competition policy for the telecommunications industry * * * could not be frustrated by the isolated actions of individual municipal authorities or states." *Texas PUC Order*, 13 F.C.C.R. at 3463 ¶ 4. Because the "goal of opening local markets to competition" can be frustrated "not only [by] express restrictions on entry, but also [by] restrictions that indirectly produce that result," *id.* at 3480 ¶ 41, the Commission has interpreted Section 253(a) to reach any legal barrier that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment," *California Payphone Or-*

[state universal service contribution] requirements actually have [the] effect" of prohibiting an entity from providing service).

[2] *Silver Star Tel. Co. Petition for Preemption & Declaratory Ruling*, 12 F.C.C.R. 15,639, 15,656-15,657 ¶ 38 (1997), aff'd, 13 F.C.C.R. 16,356 (1998), petition for review denied *sub nom. RT Commc'ns v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

der, 12 F.C.C.R. at 14,206 ¶ 31. Contrary to petitioners' arguments, however, the decisions below need not be read as confining the application of Section 253(a) to only those legal requirements that completely bar new entry.

a. The Eighth Circuit made clear in its opinion that a plaintiff need not show a "complete or insurmountable prohibition" to prevail under Section 253(a). 08-626 Pet. App. 31a. Rather, the court, citing the *California Payphone Order*, announced a preemption standard that is substantially similar to the Commission's—*i.e.*, whether the challenged requirement creates "an existing material interference with the ability to compete in a fair and balanced market." *Ibid.*; see *id.* at 32a (stating that the relevant inquiry is "whether the City's ordinance actually or effectively prohibited or materially inhibited Level 3's ability to provide telecommunications services").

Moreover, contrary to Level 3's contention (08-626 Pet. 14, 17-18), nothing in the Eighth Circuit's decision states that existing carriers, such as Level 3, must exit the market before they can bring a Section 253 claim. Instead, the court reviewed the record and found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." 08-626 Pet. App. 32a. The court appears to have accorded inordinate significance to Level 3's inability to "state with specificity what additional services it might have provided" if it were not required to pay St. Louis's license fee. *Ibid.* (quotation marks and citation omitted). That specific failure of proof—which the court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3's case—is not central to a proper Section 253(a) inquiry. Nevertheless, because the Eighth Circuit properly stated a pre-

emption standard that is consistent with the Commission's, that shortcoming in its explanation of its decision does not require this Court's correction.

b. Similarly, the decision of the Ninth Circuit can reasonably be understood to reflect a mode of analysis that is consistent with the FCC's interpretation of Section 253. To be sure, that court did not expressly adopt the Commission's "existing material interference" test. Portions of the Ninth Circuit's decision, moreover, could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail. See 08-759 Pet. App. 8a-9a (noting that, under the *Auburn* standard, which the court overruled, local regulations that "create[] a substantial barrier" to the provision of service would be preempted) (quotation marks and citation omitted). As discussed above, limiting the preemptive reach of Section 253(a) to legal requirements that completely preclude entry would frustrate the policy of open competition that Section 253 was intended to promote.

Notwithstanding those concerns, further review of the Ninth Circuit's decision is not warranted, because the en banc court did not reject the Commission's standard. To the contrary, the court cited the *California Payphone Order* as relevant authority, and it stated that "our interpretation is consistent with the FCC's." 08-759 Pet. App. 11a. In addition, the court determined that San Diego would violate Section 253(a) if it implemented its wireless siting ordinance in a manner that "stall[ed] applications" or "impose[d] an excessively long waiting period," *id.* at 15a. That observation demonstrates the court's recognition that Section 253 can preempt legal requirements that fall short of a complete ban on service. Indeed, because the Ninth Circuit

viewed Sprint's challenge to San Diego's wireless siting ordinance as a facial challenge governed by *United States* v. *Salerno*, 481 U.S. 739 (1987)—under which a plaintiff must show that there is "no set of circumstances" under which the challenged statute would be valid (*id.* at 745)—the court did not foreclose a future challenge to San Diego's ordinance based on evidence that the county is implementing the ordinance in a manner that materially inhibits or limits carriers' ability to provide telecommunications services. 08-759 Pet. App. 15a. For those reasons, there is no sound basis for concluding that the Ninth Circuit's reading of Section 253(a) will frustrate federal competition policy goals.

B. There Is No Conflict Among The Courts Of Appeals That Warrants This Court's Intervention At This Time

1. The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of the First, Second, and Tenth Circuits. 08-759 Pet. App. 9a; see 08-626 Pet. App. 30a. Although petitioners characterize the differences as "widespread" (08-626 Pet. 24) and "substantial" (08-759 Pet. 13), the courts of appeals in fact agree on the starting point for analysis. The First, Second, and Tenth Circuits, like the Eighth and Ninth Circuits, have correctly cited the Commission's *California Payphone Order* as relevant authority regarding the standard to be applied under Section 253(a). See *Puerto Rico Tel. Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) (*Santa Fe*). Moreover, the First, Second, and Tenth Circuits, like the Eighth

Circuit, have expressly recognized that, under the *California Payphone Order*, a state or local requirement violates Section 253 if it materially inhibits the ability of competitors to provide service, even if it does not completely preclude the provision of service. *Puerto Rico Tel. Co.*, 450 F.3d at 18; *TCG New York*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1271.

To be sure, the First, Second, and Tenth Circuits have applied the "materially inhibits" standard through the lens of *Auburn*, under which a legal requirement was subject to preemption if it *might* have had the effect of prohibiting the ability of an entity to provide telecommunications services. See *Puerto Rico Tel. Co.*, 450 F.3d at 18 ("Section 253(a) preempts laws that 'may prohibit or have the effect of prohibiting' the provision of telecommunications services.") (citation omitted); *Santa Fe*, 380 F.3d at 1270 & n.9 (applying *Auburn* standard); *TCG New York*, 305 F.3d at 76 (suggesting that a local government's reservation of the "right to prohibit" service amounts to a violation of Section 253(a)). That approach has led the Second and Tenth Circuits to suggest that Section 253(a) can preempt local ordinances that grant municipal officials discretion to forestall or deny applications for required permits or franchises, even in the absence of any evidence that the officials have actually exercised their discretion in a manner that has harmed competitive entry. *TCG New York*, 305 F.3d at 76-77; *Santa Fe*, 380 F.3d at 1270.[5]

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[5] The First Circuit has not considered whether the vesting of broad discretion in local decisionmakers constitutes a violation of Section 253(a). In *Puerto Rico Telephone Co.*, the First Circuit concluded that a locality's decision to substantially increase its fees would significantly harm the profitability of the carrier filing suit. 450 F.3d at 18-19. That record-specific determination does not conflict with any decision

Although those courts could be viewed as disagreeing with the Ninth Circuit's conclusion here that the existence of discretion is not by itself sufficient to support preemption, it is significant that, in both *TCG New York* and *Santa Fe*, the providers bringing suit had made initial attempts to invoke the localities' permitting process, rather than challenging the ordinances on their face, as Sprint did in the Ninth Circuit. *TCG New York*, 305 F.3d at 71; *Santa Fe*, 380 F.3d at 1262-1263. Neither the Second nor the Tenth Circuit has invalidated an ordinance without having before it some evidence of the ordinance's practical effect.

More importantly, since the Second and Tenth Circuits' decisions relying on *Auburn* were issued, the Eighth Circuit has declined to follow *Auburn*, and the en banc Ninth Circuit has overruled it. In light of those developments, it is unlikely that additional circuits will follow the repudiated *Auburn* decision, and those that already have done so may reconsider the issue. Indeed, even the petitioners here do not attempt to defend the interpretation of Section 253(a) articulated in *Auburn*. This Court therefore should allow courts of appeals and the Commission to continue to develop the law in this area rather than taking up the issue at this time.

2. The Commission's express statutory authority to preempt state and local legal requirements that violate Section 253(a) provides an additional reason for this Court to deny review in these cases. See 47 U.S.C.

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of another court of appeals. The Eighth Circuit likewise has not addressed the relevance of local discretion under Section 253(a). The district court in this case found that St. Louis's ordinance did *not* provide local authorities with unfettered discretion over rights-of-way applications. 08-626 Pet. App. 58a, 59a, 65a, but the Eighth Circuit did not address that issue in rejecting Level 3's preemption claim.

253(d). As noted above, the courts of appeals generally agree that the FCC's *California Payphone Order* prescribes the relevant test for determining whether a legal requirement has the "effect of prohibiting the ability of any entity to provide any * * * telecommunications service" (47 U.S.C. 253(a)). Any disagreement among the circuits chiefly involves the application of that test to various types of state and local regulations. If such disagreements cause significant divergence in outcomes among the circuits, the Commission can restore uniformity by issuing authoritative rulings on the application of Section 253(a) to particular types of state and local requirements. Those rulings will govern the disposition of Section 253(a) claims brought in the federal courts. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U. S. 967, 982-983 (2005) (holding that an agency's reasonable interpretation of an ambiguous statute is authoritative and binding on the courts of appeals, even those that have previously interpreted the statute differently). The Commission's ability to eliminate any conflict provides an additional reason for this Court to deny review here. Cf. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

3. The Eighth Circuit noted (08-626 Pet. App. 29a) that its conclusion that Section 253(c) is not an independent basis for preemption, but instead a safe harbor for legal requirements that would otherwise violate Section 253(a), is inconsistent with the approach taken by the Sixth Circuit in *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618 (2000). In *TCG Detroit*, the Sixth Circuit concluded that a municipal franchise fee did not violate Section 253(a), but it then went on to consider whether the fee was "fair and reasonable" under Section 253(c). *Id.* at 624 (quotation marks omitted). Although the Sixth

Circuit did not say so explicitly, its analysis suggests that it viewed Section 253(c) as having independent preemptive force. See *ibid.*

The Eighth Circuit's interpretation of Section 253(c) is correct. As the Commission has observed, Section 253(a) "is the only portion of section 253 that broadly limits the ability of states to regulate. All of the remaining subsections * * * carve out defined areas in which states may regulate." *Texas PUC Order*, 13 F.C.C.R. at 3481 ¶ 44. Thus, Subsection (c) makes clear that "*[n]othing in this section* affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation" so long as those actions fall within the terms of the subsection. 47 U.S.C. 253(c) (emphasis added). The Eighth Circuit was therefore correct when it concluded that Section 253(c) "'derives meaning only through its relationship to [Section 253(a)]'" and "standing alone, 'cannot form the basis of a cause of action against a state or local government.'" 08-626 Pet. App. 29a (quoting *BellSouth Telecomms., Inc.* v. *Town of Palm Beach*, 252 F.3d 1169, 1187, 1189 (11th Cir. 2001)).

The inconsistency between the Eighth Circuit's decision and the Sixth Circuit's analysis in *TCG Detroit* does not warrant this Court's review. The Sixth Circuit's suggestion that Section 253(c) might provide an independent basis for preemption was dicta, since the court ultimately concluded that Section 253(c) did not preempt the challenged local law. See *TCG Detroit*, 206 F.3d at 624-625. No other court of appeals has adopted the Sixth Circuit's approach, and cases in which the courts are asked to apply Section 253(c) independently of Section 253(a) are rare.

C. Neither Petition Presents An Appropriate Vehicle For This Court's Review Of The Questions Presented

1. *No. 08-626.* The petition in No. 08-626 is not an appropriate vehicle for consideration of the Section 253(a) standard because there does not appear to be a fully developed record on the effect of St. Louis's ordinance on the ability of Level 3—or any other competitor—to provide telecommunications services. Although Level 3 challenges various non-fee provisions of St. Louis's ordinance, its principal dispute is with the license fee that St. Louis imposes on the company for access to municipal rights-of-way. The district court, however, did not engage in particularized fact-finding on the effect of any of the challenged provisions on Level 3. Instead, relying on *Auburn*, it simply described the challenged law and then concluded summarily that "the ordinance includes several provisions that in combination have the effect of prohibiting the ability to provide telecommunications services under 47 U.S.C. § 253(a)." 08-626 Pet. App. 49a (quotation marks omitted). The Eighth Circuit likewise did not discuss the record at any length, but simply concluded that Level 3 had failed to meet its burden under Section 253(a). *Id.* at 32a-33a. The undeveloped state of the record is further reflected in Level 3's attempt to reopen discovery after remand in order to "gather further evidence of 'actual or effective prohibition.'" *Id.* at 3a (citation omitted). And the absence of particularized fact-finding is especially problematic because key facts relevant to Level 3's preemption claims appear to be in dispute. See 08-626 Br. in Opp. 2-9 & nn.2, 4, 5, 6. The inadequacy of the evidentiary record provides an additional reason for the Court to deny review in No. 08-626.

2. *No. 08-759.* This case likewise does not appear to present a sufficient record for this Court to consider the standard for preemption under Section 253(a). Neither the district court nor the court of appeals looked beyond the face of San Diego's wireless-siting ordinance to consider its practical effect on the ability of a carrier to provide telecommunications services. 08-759 Pet. App. 14a-16a, 48a, 70a-74a. Thus, as it comes to this Court, the case contains no analysis by the lower courts of the "practical effect," *Texas PUC Order*, 13 F.C.C.R. at 3470 ¶ 22, of the San Diego ordinance on wireless carriers' ability to provide service in a "fair and balanced legal and regulatory environment," *California Payphone Order*, 12 F.C.C.R. at 14,206 ¶ 31.

In addition, No. 08-759 raises an unresolved threshold question: whether Section 253(a) applies to wireless-siting ordinances or whether, instead, such ordinances can be challenged only under Section 332(c)(7). Sprint argues (08-759 Pet. 26 & n.7) that it can "plainly" challenge San Diego's wireless-siting ordinances under Section 253(a) because "Section 253(a) applies to challenges to 'statutes' and 'regulations,' * * * whereas Section 332(c)(7) applies only to challenges to particular 'decisions' made by local authorities." But San Diego contends (08-759 Br. in Opp. 34) that because Section 332(c)(7)(B)(i)(II) refers to state and local "regulation of the placement, construction, and modification" of wireless facilities, Section 332(c)(7) provides the exclusive statutory mechanism for challenging wireless-siting regulations as well as decisions about individual facilities.

The Ninth Circuit found it unnecessary to resolve that question because it construed Sections 253(a) and 332(c)(7)(B)(i)(II) to impose the same preemption standard. See 08-759 Pet. App. 13a. The court might revisit

that conclusion, however, if this Court were to reverse the Ninth Circuit's interpretation of Section 253(a). In addition, the Commission is now considering the relationship between Sections 253(a) and 332(c)(7)(B)(i)(II) in connection with a pending petition for a declaratory ruling.[4] By denying review in this case, the Court would give the expert agency charged with the administration of the statute an opportunity to address that unresolved question.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[4] CTIA—The Wireless Association's Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165 (filed July 11, 2008).